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No. 87-1277

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

A. LOCKHART, DIRECTOR
ARKANSAS DEPT. OF CORRECTION ..... *Petitioner*

VS.

JOHNNY LEE NELSON ..... *Respondent*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED ON DECEMBER 30, 1987.
CERTIORARI GRANTED ON FEBRUARY 29, 1988.

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
Mar. 25, 1960	Respondent Nelson convicted of assault with intent to rape by a jury in Union County Circuit Court, Arkansas.
Mar. 28, 1960	Respondent Nelson sentenced to fourteen years imprisonment in the Arkansas Department of Correction by the Union County Circuit Court for his Mar. 25, 1960, conviction of assault with intent to rape.
Nov. 13, 1964	Governor Orval E. Faubus pardons respondent Nelson for his Mar. 25, 1960, Union County conviction for assault with intent to rape.

Mar. 12, 1982 — Respondent Nelson pleads guilty to burglary and theft of property charges in Union County Circuit Court and a jury sentences him to twenty years imprisonment in the Arkansas Department of Correction as an habitual offender.

May 31, 1983 — The Arkansas Supreme Court grants respondent Nelson's motion for a belated direct appeal.

May 2, 1984 — The Arkansas Court of Appeals, in an unpublished opinion, denies respondent Nelson's belated direct appeal in which he attacked the validity of his twenty-year sentence as an habitual offender.

Nov. 19, 1984 — The Arkansas Supreme Court, in an unpublished *per curiam* opinion, denies respondent Nelson's petition requesting permission to proceed in Union County Circuit Court for postconviction relief.

Jan. 25, 1985 — Respondent Nelson files a petition seeking habeas corpus relief pursuant to 28 U.S.C. §2254 in the United States District Court for the Eastern District of Arkansas with regard to his twenty-year sentence as an habitual offender imposed in Union County Circuit Court on Mar. 12, 1982.

July 8, 1985 — United States Magistrate Robert Faulkner issues a memorandum and order recommending that respondent Nelson's petition for relief pursuant to 28 U.S.C. §2254 be dismissed.

July 26, 1985 — United States District Court Judge G. Thomas Eisele, Chief Judge of the United States District Court for the Eastern District of Arkansas requests, by letter, that petitioner Lockhart's counsel determine whether respondent Nelson had, in fact, received a pardon for his Mar. 25, 1960, Union County Circuit Court conviction for assault with intent to rape.

Aug. 13, 1985 — Petitioner Lockhart files a supplemental response in which he admits that respondent Nelson had, in fact, received a pardon for his Mar. 25, 1960, conviction in Union County Circuit Court for assault with intent to commit rape.

June 6, 1986 — Judge Eisele enters an order in which he holds that former jeopardy considerations of the Fourteenth Amendment and Fifth Amendment bar respondent Nelson's resentencing in Union County Circuit Court as an habitual offender and in which he directs the State of Arkansas to resentence respondent Nelson on the charges (burglary and theft of property) underlying his sentence of Mar. 12, 1982, in Union County Circuit Court or suffer the issuance of the writ of habeas corpus to respondent Nelson pursuant to 28 U.S.C. §2254.

July 7, 1986 — Petitioner Lockhart files a notice of appeal to the United States Eighth Circuit Court of Appeals of Chief Judge Eisele's order of June 6, 1986, granting habeas corpus relief to respondent Nelson.

Sept. 3, 1987 — The United States Eighth Circuit Court of Appeals hands down an opinion and judgment affirming Chief Judge Eisele's order of June 6, 1986.

Dec. 30, 1987 — Petitioner Lockhart dockets his petition for a writ of certiorari to the United States Eighth Circuit Court of Appeals with this Court.

Feb. 29, 1988 — This Court grants petitioner Lockhart's petition for a writ of certiorari to the United States Eighth Circuit Court of Appeals.

PENITENTIARY COMMITMENT

STATE OF ARKANSAS, COUNTY OF UNION

STATE of Arkansas *vs.* Johnny Lee NELSON
Case No. 9078

In the Union Circuit Court, Proceedings March 28, 1960; Indictment for Assault with Intent to Rape

This day comes the State of Arkansas by Hon. W. I. Prewett, Prosecuting Attorney, and comes the defendant in proper person in custody of the Sheriff and by his Attorneys, T. O. Abbott and Wayne Jewell, and said defendant having been convicted of the crime of Assault with Intent to Rape on March 25th, 1960, by a Jury in this Court, and said Jury having fixed his punishment at Fourteen (14) Years in the Arkansas State Penitentiary, and this cause coming on for the pronouncement of sentence and the said Defendant having no legal reason to show why judgment and sentence should not be pronounced, the Court pronounced the following judgment and sentence, to-wit:

It is therefore considered, ordered and adjudged by the Court that said defendant be remanded into the custody of the Sheriff of Union County, and to be by him safely and speedily transported to the Penitentiary House or State Convict Farm or Camps of the State of Arkansas, and there confined at hard labor for the period of fourteen (14) years and that the State of Arkansas do have and recover of said defendant all the costs of this prosecution and have execution therefor. It is further ordered by the Court, that the Clerk of this Court make out and deliver to said Sheriff a certified copy of the foregoing judgment to be by him delivered to the Agent or Keeper of said Penitentiary as sufficient authority for him to receive and confine the said Johnny Lee Nelson in the manner aforesaid.

STATE OF ARKANSAS
EXECUTIVE DEPARTMENT

PROCLAMATION

TO ALL TO WHOM THESE PRESENTS SHALL COME . . . GREETINGS:

WHEREAS, Johnny Lee Nelson, Black Male, No. 57539, was convicted in Union County of the crime of Robbery and sentenced April 5, 1960, to a term of seven (7) years in the Arkansas State Penitentiary; and

WHEREAS, additional sentence of fourteen (14) years, being case number 9078, State of Arkansas vs. Johnny Lee Nelson, County of Union, State of Arkansas, has been imposed to be served consecutively to the above sentence; and

WHEREAS, the Board of Pardons, Paroles and Probation, and with the approval of the Court Officials, recommend that he be pardoned on this consecutive sentence for which he has not begun to serve;

NOW, THEREFORE, I, Orval E. Faubus, by virtue of the power and authority vested in me as Governor of the State of Arkansas, do hereby pardon Johnny Lee Nelson of the crime in case number 9078, State of Arkansas vs. Johnny Lee Nelson, and restore to him all rights, privileges and immunities as enjoyed before passage of this particular sentence.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed hereto the Great Seal of State in the Governor's Office, Little Rock, Arkansas, this 13th day of November, 1964.

/s/ Orval E. Faubus
GOVERNOR

[48] IN THE
CIRCUIT COURT OF UNION COUNTY, ARKANSAS
FIRST DIVISION

State of Arkansas ..... *Plaintiff*

Vs. No. CR 79-22 Burglary and Theft

Johnny Lee Nelson ..... *Defendant*

BILL OF EXCEPTIONS

Now on this day, March 12, 1982, in the Union Circuit Court in the Thirteenth Judicial Circuit, First Division, of the State of Arkansas, before the Honorable John M. Graves, the regular judge thereof, and this cause coming on to be heard, comes the Plaintiff State of Arkansas by its Deputy Prosecuting Attorney William McLean, and comes the defendant in person and by his attorney Edwin Keaton, and both parties announce ready for trial.

THEREUPON, a jury of the regular panel was duly selected, empaneled and sworn to try the issues of the fact herein, and both parties introduced the following testimony to sustain their respective issues.

• • • • •

[53] The defendant Johnny Lee Nelson presented the following testimony:

JOHNNY LEE NELSON, after being sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KEATON:

Q. State your name please.

A Johnny Lee Nelson.

. . .

[67] CROSS EXAMINATION

BY MR. McLEAN:

Q. Mr. Nelson, if these records are correct you are the same Johnny Lee Nelson that was charged with assault with intent to rape back in 1960 and was found guilty and given a fourteen-year sentence, is that correct?

A. That's correct.

Q. You were represented by Wayne Jewell and Mr. T. O. Abbott?

A. Yes, sir.

Q. Okay. Now you went to the penitentiary then I guess in March of 1960?

A. Yes, sir.

Q. Do you recall the length of time that you were required to stay?

A. I stayed uh — well if the Jury mind me, I'd like to clear that up on that charge. This in the record it should be two charges because I see where they made a mistake. I was charged with aggravated assault and robbery which I don't know why I shouldn't be on record but what I was charged with was on commitment where I was in the institution. But at the time I only did three years and ten months on that charge because of a pardon which I had the case investigated and the governor at the time Faubus which gave me a pardon for my sentence.

[T. 68]

Q. Governor Faubus?

A. Yes, sir, which at my home I have documents of that pardon on that.

Q. You did three years and ten months?

A. Yes, sir.

Q. So you were out in '64, when you got out?

A. '64 when I got out, 1964.

Q. Okay. On the charges that you were convicted of in 1972 you received the suspended sentences on, you didn't have to go to the penitentiary?

A. No, sir.

Q. Those possession — two counts of possession of stolen property?

A. Yes, sir.

Q. Okay, and then that was in '72. In 1974 July, apparently you entered a plea of guilty to burglary and grand larceny?

A. Yes, sir, I did.

Q. You received a 21-year sentence?

A. Yes, sir.

Q. So between '72 and — you had not been charged with anything between '72 and '74?

A. No, sir.

[69]

Q. How much time did you do on the '74 sentence?

A. I done 18 months.

Q. Eighteen months?

A. (Nods affirmatively.)

Q. On an 11-year —

A. Eighteen months and a few weeks.

Q. Okay. What was that the burglary of?

A. Sir?

Q. What was that burglary — what was the place that you burglarized in that case?

A. At the time I really don't know.

Q. You don't remember?

A. No, sir.

Q. Do you remember whether this was a business or a house?

A. I think it was a business. I'm not sure.

. . .

[73] REDIRECT EXAMINATION

BY MR. KEATON:

Q. Mr. Nelson, you mentioned in reference to the very first conviction that you had something about a pardon. Was that not really the judge commuted that, your sentence to time served?

A. No, sir. Just like I said, the time when I got that charge on that rape, assault — they had me with rape, assault and a robbery. They had the sentences you know in two sentences. I had the fourteen years and I had a seven years. But during the time I was doing time, on doing time you do the smallest time first and the large time last. Well in the process I had — which my mother had, some more people had my case investigated by the F.B.I. And during that time Governor Faubus gave me a pardon on the whole thing.

[74]

Q. You're saying on the robbery charge?

A. On the robbery and the rape charge. Of course I was sentenced to 21 years and I was doing time on the robbery charge which I was supposed to have been doing time — do the robbery charge and then start on the rape charge. But in the process of the investigation they cut the whole thing to time served.

MR. McLEAN: Your Honor, I feel compelled at this time to make a motion to strike this testimony because I think the defendant is in error. I think he's confused as to the meaning of the pardon and a commutation. Now I hesitate to allow the jury to hear this and become confused and I would ask the Court to strike the testimony. It's hearsay — would be another stated objection. I think the records are clear that are in the

court and perhaps some comment by the Court to the jury could clear the matter up.

THE COURT: I think he cleared it up himself when he said it was commuted to time served. Is that what you said?

DEFENDANT: Yes, sir.

[75]

THE COURT: Does that answer your question? It was commuted to time served. It's not a pardon. Do you agree, Mr. Keaton?

MR. KEATON: Well, that's the way it sounds to me.

NOT DESIGNATED FOR PUBLICATION.
SEE REVISED SUPREME COURT RULE 21.

DIVISION II
ARKANSAS COURT OF APPEALS

No. CA CR 83-150

Opinion delivered May 2, 1984.

Johnny Lee NELSON, *Appellant* vs.
STATE of Arkansas, *Appellee*

Appeal from Union Circuit Court, Hon. John M. Graves, Judge; affirmed.

MELVIN MAYFIELD, Chief Judge. At a jury trial held on March 12, 1982, the appellant pled guilty to burglary and theft of property. The jury's verdict fixed appellant's punishment at twenty years in the Arkansas Department of Correction as an habitual offender with four prior felony convictions.

Appellant's first argument on appeal is that the trial court erred in allowing the jury to consider a conviction for which appellant had received a pardon from the governor of the state. Appellant cites *Duncan v. State*, 254 Ark. 449, 494 S.W.2d 127 (1973), which held that a conviction for which the defendant had received a pardon could not be considered to enhance his sentence as an habitual offender.

There are two problems, however, with appellant's argument. In the first place, it is not clear that appellant had received a pardon. The only evidence in that regard was appellant's own testimony and it is subject to the interpretation that he received a commutation of sentence, not a pardon.

In the second place, there was no objection to the introduction of the conviction now claimed to have been pardoned. In fact, appellant took the stand and testified that he had four prior convictions. Prior to the beginning of cross-examination, the deputy prosecuting attorney stated that he had certified copies of prior convictions which he wanted to put into evidence and the court asked defense counsel, "Any objections to any of these? You are familiar with them?" The answer was, "I am. No objection." The certified copies were then introduced and it was during cross-examination that appellant volunteered the statement about a pardon. In *Washington v. State*, 276 Ark. 140, 633 S.W.2d 24 (1982), the court said, "we have held too often for any doubt to exist that in order for questions of error to be considered on appeal, they must have been raised before the trial court by timely and proper objection."

Appellant's second point is that the court erred in failing to give AMCI 7001 concerning the disputed status of a defendant as an habitual offender. Appellant contends that his testimony regarding the pardon put one of the convictions into issue and that this jury instruction should have been given. Appellant concedes, however, that no request was made for the giving of AMCI 7001 and that no objection was made to the instructions given. There is, therefore, no issue preserved for our review in this regard. *Green v. State*, 7 Ark. App. 175, 646 S.W.2d 20 (1983); *Shepherd v. State*, 270 Ark. 457, 605 S.W.2d 414 (1980).

Appellant's present counsel was not the trial attorney in this case, and there was no objection made, or question raised, during the trial about the competency or adequacy of trial counsel. Thus, any question in that regard would have to be a Rule 37 matter; it cannot be raised on direct appeal as the trial court was not given an opportunity to rule on it. *Hunter v. State*, 278 Ark. 428, 645 S.W.2d 954 (1983).

Affirmed.

CLONINGER and GLAZE, JJ., agree.

NOT DESIGNATED FOR PUBLICATION.
SEE REVISED SUPREME COURT RULE 21.

SUPREME COURT OF ARKANSAS

No. CR 84-133

Opinion delivered November 19, 1984

Johnny Lee NELSON, *Petitioner* vs.
STATE of Arkansas, *Respondent*

Pro Se Petition to proceed in Circuit Court pursuant to Arkansas Criminal Procedure Rule 37; petition denied.

PER CURIAM. Petitioner Johnny Lee Nelson pleaded guilty to burglary and theft of property. The question of a penalty was put to a jury which fixed petitioner's sentence as an habitual offender at 20 years imprisonment. The Court of Appeals affirmed the jury's decision. *Nelson v. State*, CACR 83-150 (May 2, 1984). Petitioner now seeks permission to proceed in circuit court for postconviction relief pursuant to A.R.Cr.P. Rule 37 and requests appointment of counsel. His grounds for relief encompass both the plea itself and the sentencing phase of the trial. Ordinarily the trial court first considers allegations related to a guilty plea, but we will consider the plea and the sentencing together for the sake of expediency since it is apparent without an evidentiary hearing that there are no meritorious grounds for relief.

When a guilty plea is challenged the issues are whether the plea was intelligently and voluntarily entered and whether the accused entered the plea with advice of competent counsel. *Williams v. State*, 273 Ark. 371, 620 S.W.2d 277 (1981). The appellant has the heavy burden of establishing that counsel's advice was not competent. *Cronic v. State*, ___ U.S. ___ , 104 S.Ct. 2039 (1984); *Crockett v. State*, 282 Ark. 582, 669 S.W.2d

896 (1984). Ineffective assistance of counsel with regard to a guilty plea can be shown only by pointing to specific errors by counsel. *Crockett v. State*. Alleged errors are to be evaluated under the standard enunciated in *Strickland v. Washington*, ___ U.S. ___ , 104 S.Ct. 2052 (1984).

In *Strickland*, the court held that the criterion for judging a claim of ineffectiveness is whether counsel's conduct so undermined the proper function of the adversarial process that the appellant was prejudiced and the result of the proceeding was thereby rendered unreliable. A defendant whose conviction is based on a plea of guilty ordinarily will have difficulty in proving prejudice since his plea rests on his admission in open court that he did the act with which he is charged. *Crockett v. State*.

Petitioner first alleges that counsel was ineffective for failing to demand a change of venue. Since he does not state any ground for requesting a change of venue, petitioner has failed to demonstrate that counsel was remiss. Conclusory allegations do not justify an evidentiary hearing. *Smith v. State*, 283 Ark. 264, 675 S.W.2d 627 (1984); *Blakely v. State*, 283 Ark. 138, 671 S.W.2d 183 (1984).

Petitioner also alleges, but fails to substantiate, his claims that he did not receive the sentence he expected to receive in the plea bargain, that he did not understand the plea and that he was threatened into accepting the "plea bargain arrangement." As petitioner's sentence was set by the jury and not by means of a plea agreement, the meaning of the allegation is unclear. Also, petitioner testified when the plea was entered that there had been no threats. He had the opportunity at trial to state to the court any objections he had to the sentence or the procedure whereby sentence was set.

Petitioner next asserts that he was forced to plead guilty by counsel's threats that he would receive a greater sentence if he

pleaded not guilty. Petitioner does not explain why the jury would be more likely to set a greater sentence if he pleaded not guilty and had a full trial; but in any event, fear of a more severe sentence is not sufficient basis for setting aside a plea of guilty upon advice of competent counsel which was otherwise voluntarily and knowingly entered. *See Mitchell v. State*, 271 Ark. 512, 609 S.W.2d 333 (1980).

Petitioner states he had only 15 to 20 minutes before trial was to begin to decide whether to plead guilty. He further alleges that counsel pressured him to plead guilty because counsel did not want to engage in a complete jury trial. Again, we cannot say that petitioner suffered any prejudice. He does not contend that he was not in fact guilty nor has he stated what defense was available to the charge if counsel had elected to try the case. Petitioner has clearly failed to demonstrate that any specific act by counsel rendered his plea unreliable. *Welch v. State*, 283 Ark. 281, 675 S.W.2d 641 (1984).

Finally, petitioner alleges that counsel should have objected to the introduction into evidence of proof of his prior felony conviction from 1960 on the ground that the governor had granted a pardon in that case. Petitioner attempted to raise the issue on appeal, but it was not considered because there had been no objection in the lower court.

When petitioner testified before the jury, he admitted that he had been guilty of four prior felony convictions. He said that the 1960 conviction had been pardoned, but under questioning by his counsel, he said that the length of the prison term had been reduced to the time already served. The court then had petitioner reiterate his testimony:

> Court: I think he cleared it up himself when he said it was commuted to time served. Is that what you said?
>
> Petitioner: Yes, sir.

Court: Does that answer your question? It was commuted to time served. It's not a pardon. Do you agree, Mr. Keaton [counsel for petitioner].

Mr. Keaton: Well, that's the way it sounds to me.

Petitioner has presented nothing in this petition beyond the bare assertion that there was a pardon to indicate that he was not correct in his testimony that the governor commuted the sentence but did not issue a pardon.

Petition denied.

The United States District Court for the Eastern District of Arkansas' order of June 6, 1986, granting habeas corpus relief pursuant to 28 U.S.C. §2254 can be found in the supplemental appendix to petitioner Lockhart's petition for a writ of certiorari filed with this Court.

The United States Eighth Circuit Court of Appeals' opinion and judgment of September 3, 1987, affirming the June 6, 1986, order of the United States District Court for the Eastern District of Arkansas can be found in the appendix to petitioner Lockhart's petition for a writ of certiorari filed with this Court. The Eighth Circuit's opinion appears at A-1 to A-10. The Eighth Circuit's judgment appears at A-12.

Respectfully submitted,

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